



OFFICE OF THE  
**Attorney General**  
STATE CAPITOL  
Phoenix, Arizona 85007

BRUCE E. BABBITT  
ATTORNEY GENERAL

April 8, 1975

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**ARIZONA ATTORNEY GENERAL**

Honorable Tony Gabaldon  
State Senator  
Senate Wing, State Capitol  
Phoenix, Arizona 85007

Dear Senator Gabaldon:

By this letter we are responding to your request, dated February 20, 1975, for our opinion whether Richard Harris is legally appointed to the State Board of Education. In order to put the following response to your question in proper perspective, it is necessary that we initially consider the case of State of Arizona v. Moore, 49 Ariz. 51, 64 P.2d 809 (1937). That case held that "No officer nor tribunal other than the courts may determine whether an election or appointment is void or not", such determination normally being made pursuant to a quo warrant action commenced by the Attorney General.

With that in mind, we now turn to a discussion of the facts as related to us by your letter and as discovered by independent information and to a discussion of the legal issues involved.

The term of office with which we are concerned commenced on the third Monday of January, 1974. It is without question that Mr. Harris was legally appointed to a term on the State Board of Education prior to the term in question. As a result of the enactment of the Laws of 1972, chapter 163, §61, Mr. Harris' prior term expired on the third Monday of January, 1974. Upon the expiration of the prior term, Mr. Harris held over and exercised the duties of the office. On March 26, 1974, during the Second Regular Session of the 31st Legislature, then Governor Jack Williams signed a document entitled "Notice of Appointment", notifying Mr. Harris that he was "appointed" to be a member of the State Board of Education beginning March 26, 1974, for the term expiring on the third Monday of January, 1978. On this same day, March 26, 1974, Governor Williams transmitted by letter to William Jacquin, President of the Senate, the fact that he had reappointed Mr. Harris and asked

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that the Senate confirm the appointment.

On March 28, 1975, Mr. Harris signed, before a notary public, a document entitled "Loyalty Oath of Office", which was printed on the reverse side of the above-mentioned "Notice of Appointment". Both the "Notice of Appointment" and the "Loyalty Oath" were officially filed in the Secretary of State's office on April 2, 1974. The Secretary of State has no record of any material or document being filed regarding Mr. Harris after April 2, 1974.

On May 7, 1974, the Senate Education Committee acted on the nomination and failed to recommend it for confirmation by the Senate as a whole, and the matter was held in that Committee with no further action. The nomination was never presented to the whole Senate and the Legislature adjourned, sine die, May 10, 1974, without confirming the nomination or taking any formal action in regard to the nomination.

On May 14, 1974, then Governor Williams wrote a letter, on stationery from his office, to Mr. Harris stating that the Senate adjourned without taking formal action on his nomination and that he therefore was confirming Mr. Harris' appointment. There is no record in either the Secretary of State's office or the office of the State Board of Education of the letter of May 14, 1974, nor of any other documents filed regarding Mr. Harris after April 2, 1974. Mr. Harris is now currently serving as a member of the State Board of Education.

The facts as stated above raise several issues relating to the proper interpretation of A.R.S. § 38-211, which provides as follows:

§ 38-211. Nominations by governor;  
consent of senate;  
appointment

- A. When it is provided by law that a state officer shall be appointed pursuant to this section, the governor shall nominate and with the consent of the senate appoint such officer as prescribed in

this section.

- B. If the term of any state office which is appointive pursuant to this section expires, begins or becomes vacant during a regular legislative session, the governor shall during such session nominate a person who meets the requirements of law for such office, and shall transmit his nomination to the president of the senate forthwith. If the senate consents to the nomination, the governor shall then appoint the nominee to serve for the term, or, in the case of a vacancy, for the unexpired term in which the vacancy occurred. If the senate rejects the nomination the nominee shall not be appointed and the governor shall nominate another person who meets the requirements for such office as soon thereafter as is practicable. If the senate takes no formal action on the nomination during such legislative session the governor may after the close of such legislative session appoint the nominee to serve for the term, or, in the case of a vacancy, for the unexpired term in which the vacancy occurred.
- C. If the term of any state office which is appointive pursuant to this section expires, begins or becomes vacant during a time in which the legislature is not in regular session, the governor shall nominate a person who meets the requirements of law for such office and shall transmit his nomination to the president of the senate during the first week of the next regular session. Thereafter the procedures shall

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be the same as provided in subsection B of this section for nomination, consent, rejection, failure of the senate to take formal action and appointment.

- D. A nominee for an office for which the term of the lawfully appointed incumbent officer has expired may not serve in such office prior to the consent of the senate and subsequent appointment by the governor, so long as the incumbent shall continue to hold office and serve pursuant to § 38-295. In all other cases a nominee for office shall have the full authority to perform and shall begin to discharge the duties of such office immediately upon being nominated by the governor and subject to termination of such authority in the event of rejection of the nomination by the senate.
- E. Nominations made by the governor shall be in writing, designating the residence of the nominee and the office for which he is nominated.
- F. When the senate consents to a nomination, its secretary shall deliver a copy of the resolution of consent, certified by the president of the senate, to the secretary of state, who shall notify the governor thereof. When the senate rejects a nomination, its secretary shall inform the governor forthwith.

This law clearly provides that if the Senate takes no formal action on a nomination during a regular legislative session, the Governor may, after the close of the session, appoint the person nominated to serve for the term.

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Under the facts as stated here, we must look at three additional laws which do not provide for such an easy answer in view of the fact that a member of the State Board of Education is involved.

The Arizona Constitution, Article 11, § 3, as amended, provides as follows:

§3. State board of education;  
composition; powers and  
duties; compensation

3. The State Board of Education shall be composed of the following members: the Superintendent of Public Instruction, the President of a State University or a State College, three lay members, a member of the State Junior College Board, a superintendent of a high school district, a classroom teacher and a county school superintendent. Each member, other than the Superintendent of Public Instruction, to be appointed by the Governor with the consent of the Senate. The powers, duties, compensation and expenses, and the terms of office of the Board shall be such as may be prescribed by law. [emphasis supplied]

As can be seen, the Constitution, without limitation or qualification, requires the consent of the Senate when a member of the State Board of Education is appointed by the Governor.

Article 2, § 32, Arizona Constitution, states that the provisions of the Constitution are mandatory unless by express words they are declared to be otherwise.

A.R.S. § 15-101.01, as amended in 1972, at the same time A.R.S. § 38-211 was amended, provides as follows:

§ 15-101.01 State board of education;  
members; appointment;  
terms

\* \* \* \* \*

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- B. Each member, other than the superintendent of public instruction, shall be appointed by the governor pursuant to § 38-211.

This statute, by referring back to A.R.S. § 38-211, authorizes the Governor to appoint a member of the State Board of Education without the consent of the Senate after the Senate has adjourned without taking any formal action regarding the nomination of the individual appointed.

In our view, A.R.S. § 15-101.01.B and A.R.S. § 38-211 rather clearly conflict with Article 11, § 3 of the Arizona Constitution. Such being the case, the constitutional provision, Article 11, § 3, must control, and A.R.S. § 15-101.01.B, as it relates to the appointment of members of the Board of Education, is ineffective. Bolin v. Superior Court, 85 Ariz. 131, 333 P.2d 295 (1958).

It necessarily follows from this conclusion that the Governor cannot appoint a member of the State Board of Education without the consent of the Senate as required by the Arizona Constitution. Since the Senate has not consented to the appointment of Mr. Harris, his purported appointment after the adjournment of the 1974 legislative session is of no force and effect.

This is not to say, however, that Mr. Harris is occupying the office illegally or without authority since the expiration of his prior term in January of 1974. A.R.S. § 38-295.B provides as follows:

- B. Every officer shall continue to discharge the duties of his office although his term has expired until his successor has qualified.

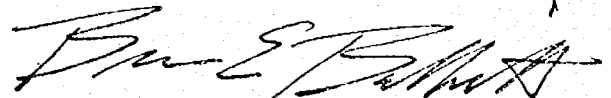
Pursuant to this provision of our law, Mr. Harris' prior term is not extended but his tenure in office is, and he is required by law to hold over and discharge the duties of his office until a successor has qualified. All of the official acts he has performed as a member of the State Board of Education cannot be called into question because of the method in which he holds the office. See Graham v.

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Lockhart, 53 Ariz. 531, 91 P.2d 265 (1939); Rodgers v. Frohmiller, 59 Ariz. 513, 130 P.2d 271 (1942).

Our conclusion that Mr. Harris' purported appointment is of no force or effect renders moot several other issues relating to the procedure and method followed in attempting to appoint Mr. Harris; namely, whether the "Notice of Appointment" dated March 26, 1974 would have constituted a valid "nomination", whether the "Loyalty Oath of Office" and "Notice of Appointment" filed April 2, 1974 would have been in compliance with A.R.S. §§ 38-211, 38-232, 38-233, and what the effects of non-compliance with the foregoing statutes would be.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Bruce E. Babbitt', with a stylized flourish at the end.

BRUCE E. BABBITT  
Attorney General

BEB:gs